

November 10th 1746.

ANSWERS

FOR

Hugh Ross Merchant in *London*, *John MacFarlane* Writer to the Signet, and *James Wemyss* Merchant in *Edinburgh*, Adjudgers from *Alexander Brownlie* Adjudger of the Lands of *Williecleugh*, and *Robert Pringle* Writer in *Edinburgh*, another Adjudger of the said Estate, and others Creditors upon the said Estate ;

TO THE

PETITION of *Helen Allston*, the Disponee of *Elisabeth Ramsay* her Mother, deceased.

THE Petitioner having disguised or mistated the Fact, the Respondents think it is necessary, in as few Words as is possible, to lay before your Lordships a distinct State of the Parties Rights, and of the several Proccesses that have been betwixt them, and the Steps that have been taken therein, upon which the Point now in Dispute depends.

Sir *George Ramsay* was Proprietor of the Lands of *Williecleugh* above a Century ago, and the said Sir *George*, with Consent of his Wife and *George Ramsay* his Son, disposed the same to *John Trotter*, redeemable by Sir *George* for Payment of 5000 Merks; and of the same Date, Sir *George* disposed the Reversion to *Hope-Pringle* of *Torsonce* his Son-in-Law, upon which Wadset-right *Trotter* was infest, and then disposed his Wadset to *Torsonce*. 8th June 1634. 1635.

The said *George Ramsay* ratified *Hope-Pringle's* Right, and *Hope-Pringle* granted him a Reversion of the Lands, for Payment of 5000 Merks, and also granted him a Back-tack, for Payment of a Back-tack duty of 400 Merks yearly, during the Subsistence of the Wadset, and these Back-tack-duties were regularly paid up till the 1639 or 40; but from that Time downwards, it appears, that either they were not paid, or that *Hope-Pringle* and his Brother-in-Law had a Mind to make the Tack-duties a Debt upon the Estate. 1637.

For in the Year 1644, *Hope-Pringle* took a Decreet for the bygone Back-tack-duties against his other Brother-in-Law *John Ramsay*, the Heir of the said *George*, who was then dead, and also for the Wadset Sum, for which, and one or two trifling Debts more, he apprised the whole Lands of *Williecleugh*, and a Wadset of the Lands of *Kippilaw*, that belonged to the said *Ramsay*; for the accumulate Sum of 9131 *l.* 5 *s.* Scots Money, and 455 Merks of Sheriff Fee, and exped a Charter under the Great Seal, and an Infestment on the said Apprising, which he and his Brother-in-Law, *John Ramsay* the apparent Heir, seemed to have intended to set up as a singular Title to carry off the Estate, and exclude other lawful Creditors; but whether *Hope-Pringle* or *John Ramsay* possessed the Lands after this Apprising, it is impossible for the Respondents to know at this Distance of Time.

A few Days after this Apprising was led, *Kinnier of Forret* deduced another Apprising upon a Bond of Sir *George Ramsay's*, for the accumulate Sum of 1950 Merks, and 97 $\frac{1}{2}$ Merks of Sheriff Fee; but as *Hope-Pringle's* Apprising was the first and preferable Apprising, and exclusive of the other, conform to the Laws for the Time, this second Appriser got no Possession of any Part of the Estate for 20 Years.

After the said *John Ramsay's* Death, *Hope-Pringle* disposed his Apprising to *George Ramsay* his Nephew, the Son of the said *John*; and in *January* 1658, they two concurred 1656.

curred in granting a Wadset of the greatest Part of the Lands of *Williecleugh*, for the Sum of 1000 *l. Sterl.* to Mr. *John Clapperton*, and his Wife in conjunct Fee and Life-rent, and to Mr. *John's* Heirs, but with the Burden of a Liferent of the one Half to Mr. *John Clapperton's* Mother, and to *Don of Newton*, in real Warrandice of some Lands, which Mr. *John Clapperton* had antecedently sold to him, redeemable by the said *George Ramsay*, on Re-payment of the 1000 *l.* and likewise of the Interest of 1000 *l. Scots* yearly, during all the Years that the Wadset should subsist, the Rents of the Wadset Lands, in the Computation of Parties, being no more than sufficient to answer the Interest of 11000 *l. Scots* of the Money advanced upon the Wadset.

Hope-Pringle and *George Ramsay* did also dispoise to the said Mr. *John Clapperton*, and his Wife and Mother, and *Don of Newton*, the Remainder of the Lands of *Williecleugh* in real Warrandice, in case of Eviction of the Warrandice Lands.

How much of this 1000 *l. Sterl.* was applied to *Hope-Pringle's* Payment, or whether he allowed *George Ramsay* to take the whole, contenting himself with the bygone Rents intromitted with, and the Wadset of the Lands of *Kippielaw*, redeemable for 5000 Merks, which he reserved, is a Matter of Fact, that the Respondents are not informed of; but this is certain, that the Rents of the Lands from the Date of the Apprising, and the 1000 *l. Sterl.* raised upon the Wadset to *Clapperton*, and the 5000 Merks upon *Kippielaw*, behoved to be a great deal more than the Sum due upon this Apprising; but there being no Law at the Time to check such Frauds of apparent Heirs, and the Legal of *Hope-Pringle's* Apprising being expired in June 1652, *Kinnier* the second Appriser had no Remedy nor Access to any Thing.

At the Time of deducing these Apprisings, the Lands of *Easter Williecleugh*, which Parties chused to call the Warrandice Lands, were liferented by Sir *George Ramsay's* Widow, who lived till the Year 1664 or 1665; and about the Time of her Death, *George Clapperton*, a Brother of Mr. *John's*, having purchased *Kinnier's* Apprising, he got Possession of the Warrandice Lands as soon as the Widow died; and sometime thereafter, in the Year 1665, his Brother Mr. *John*, who had a numerous Family of Children, wanting his Money, for which he had used Requisition, in the 1663, to no Purpose, the said *George Clapperton* also acquired Mr. *John's* Wadset, which was disposed to him by Mr. *John*, with Consent of the Liferenters, and of *Don of Newton*.

And in order to remove *Hope-Pringle's* Apprising out of the Way, he raised and insisted in a Process of Declarator of Extinction of *Hope-Pringle's* Apprising, to which *Hope-Pringle* of *Torsonce*, and *Elisabeth* and *Marion Ramsays*, Daughters and Heirs of the said *George* who was then dead, were made Parties; and in this Process Appearance was made for the Defenders, and particularly for *Torsonce*: And the Point disputed was, Whether the Appriser was to be accountable for any Intromissions he had during the Years of the prorogated Legal, *George Clapperton* having used an Order of Redemption before *Whitsunday* 1664, and your Lordships found the Appriser accountable for his Intromissions, and this Decision is recorded in *January* 1666, both by the Lord *Stair* and Sir *John Gilmore*; and the Creditors have great Reason to believe, that in the Year 1667, the said *George Clapperton* obtained a Decreet of Declarator of Extinction of *Hope-Pringle's* Apprising; and tho' the Creditors have not been able to recover the said Decreet, which unfortunately for them is lost; yet they can give Evidence, tho' not a full legal one, of the Existence of it; the Decision, as recorded, makes it highly probable, that such a Decreet was obtained; and there is produced in Process an extracted Act, dated 1684, in a Process which *Elisabeth Ramsay* brought before your Lordships in the 1680, for reducing this Decreet of Declarator of Extinction: And there is likewise in Process a Decreet obtained by the said *Elisabeth Ramsay*, in the Year 1692, transferring the said Act and subsequent Steps of Process, against *John Clapperton* the Heir of the former Defender.

Elisabeth Ramsay and *Marion* her Sister were Minors at *Whitsunday* 1664, when the Years of the prorogated Legal would have otherways expired; and by Reason of their Minority, the Legal continued current till the Majority of *Elisabeth*, *Marion* having died, who did not come of Age till the Year 1675, and with the Addition of the *quadrannium utile*, it was competent for her to redeem *Kinnier's* Apprising at any Time before the 1679, in order to which, she brought a Process of Declarator of Extinction, in the Year 1678, a very strong Presumption, that she had nothing to say on *Hope-Pringle's* Apprising, which had been declared extinguished in the Year 1667; for had this Apprising been in Force, as it was preferable to *Kinnier's* Apprising, it was useless

to her to bring a Process of Declarator of Extinction of *Kinnier's* Apprising, or to attempt to redeem the same, upon Payment of the Sums due.

And so little Notion had she of a better Right by *Hope-Pringle's* Apprising, that although in the Year 1680 she commenced a Process of Reduction of *Clapperton's* Decree of Declarator of Extinction of *Hope-Pringle's* Apprising, though in the same Summons she libelled also a Declarator of Extinction and Reduction of *Kinnier's* Apprising, it appears from the Act 1684, that she did not insist in the Reduction reductive of *Clapperton's* Decree, which no doubt she saw would be fruitless, but she insisted solely in her Reduction of *Kinnier's* Apprising, and obtained an Act for proving the Rent of the Warrandice Lands, which *Clapperton* had possessed in that Time, and accordingly examined Witnesses on the Rental, and the Steps of that Process, so far as they are extant in the Year 1691, 92 and 94, all tend to that Point; and in the 1694 it being disputed, whether a naked Declarator of Extinction of *Kinnier's* Apprising, raised within the Legal, without a preceeding Order of Redemption, could intitle the Pursuer *Elisabeth Ramsay* to redeem after the Legal, on Payment of the Balance; and whether or not *Clapperton* was liable to accompt for his Intromissions upon *Kinnier's* Apprising after the Legal expired? Your Lordships in Presence did, on the 21st July 1694, upon a Petition for *John Clapperton* of *Williecleugh*, pronounce the following Interlocutor; *Having heard this Bill, find, that the Petitioner is not countable for the Rents intromitted with after the Expiry of the Legal of his Apprising; but they adhere to the Interlocutor finding, that the Summons of Declarator, execute against the Petitioner before the Expiry of the Legal, makes the Legal current ad hunc effectum, only that if a great Part of the Sums due by the Apprising, be found paid by the Petitioner's Intromissions within the Legal, the Raisher of the Declarator may purge the Apprising, and extinguish it by Payment of the Superplus of the said Sums, which, on the Event of the Compt and Reckoning, shall be found truly resting at the Time of expiring of the Legal; and remit to the Ordinary to proceed accordingly.*

This Interlocutor, though in Appearance favourable for the Pursuer, yet in Effect it put an End to her Cause. She was not able to make it appear, nor was it Fact, that a great Part of the Sums in *Kinnier's* Apprising were paid by Intromission before the 1679; the Rents of the Warrandice Lands, with which *Clapperton* had intromitted on this Title, from the 1665 downwards, had not, when the Legal expired, paid the current and bygone Annualrent due on *Kinnier's* Apprising: And therefore the Pursuer dropt her Process, which ended in this Manner after a Dependence of fourteen Years.

From this State of the Rights, and of the Procedure, so far as hitherto stated, it must appear evident to your Lordships, that the Pursuer has no Pretence to insist to bring the Defenders to accompt for the Intromissions with the Rents of the Warrandice Lands had upon *Kinnier's* Apprising before the Year 1694, nor thereafter, till, by some new Process, and Production or Judgment, the Case was altered.

Surely it cannot with Justice be pretended, that *George Clapperton* was in *mala fide*, or guilty of any Fraud, in taking Possession of the Warrandice Lands on *Kinnier's* Apprising, although he knew of *Hope-Pringle's* Apprising, and had Right to it, so far as to intitle him to possess the Wadset Lands, tho' not to possess the Warrandice Lands: But, on the contrary, it would have been a Fraud on the Heirs of *George Ramsay*, to have debarred *Clapperton*, by setting up *Hope-Pringle's* Apprising as a singular Title to exclude the other Appriser, when *Ramsay* the apparent Heir, who acquired this preferable Apprising, was more than doubly paid of all that he could claim upon it, at least he, and those deriving Right from him, possess Lands contained in it more than double the Value of the Sum contained in that Apprising; and tho' the Statute for obviating the Fraud of apparent Heirs by acquiring singular Titles, was not then made, yet such Acquisitions were always in Reality fraudulent: And therefore your Lordships can never judge, even in a Case before the Statute, that an honest Creditor was in *mala fide* to possess upon his Diligence, when, to be sure, the apparent Heir would have been in *peissima fide* to have debarred him by a singular Title in this Case.

But 2^{do}, It is not intire for the Pursuer to dispute this Point, when your Lordships did in the Year 1694, find expressly, that *Clapperton* was not accomptable for any Intromission had by him after Expiry of the Legal of *Kinnier's* Apprising, anno 1679; and therefore the Pursuer can have no Pretence to claim these bygone Rents, till

till somewhat happens afterwards betwixt the Parties, that may have changed Circumstances.

From the Year 1694 till the Year 1726, *Clapperton* of *Williecleugh* continued in the peaceable Possession of the Warrandice Lands, as well as the Wadset Lands, without any Process or Disturbance on the Part of *Elisabeth Ramsay*, or her Daughter *Mrs. Alston*, so far as the Respondents know.

But, in the Year 1726, this Process, in which Parties have been engaged these twenty Years past, was commenced; and at that Time the Pursuer insisted in two several Processes, upon the Title of Heir served and retoured in general to her Predecessors; the first a Process of Reduction and Improbation, in which she extracted a Certification *contra non producta*, and the other was a Process of Declarator of Extinction, both of the Wadset and of *Kinnier's* Apprising, containing also a Conclusion of Mails and Duties.

In this Process the Pursuer insisted, in the first Place, to have it found, that she was intitled to redeem the Wadset Lands; but it being pled for *Clapperton* of *Williecleugh*, that the Wadset Lands were not redeemable from him, in respect of his Right thereto in virtue of *Kinnier's* Apprising: The Pursuer alledged, That the Defender, his Predecessor *George Clapperton* the Wadsetter, could not lawfully acquire this Apprising, and set it up to exclude the Right of Redemption of the Wadset, as being contrary to the *Fiducia*, that was necessarily established betwixt the Reverser and Wadsetter; and that the Defender was only intitled to demand Repayment of the Sums depuried in purchasing this Apprising; which, when the Defender should condescend upon, he undertook to shew were satisfied and paid. And your Lordships accordingly found, that the Defender could not plead upon the Apprising in Bar of Redemption of the Wadset, and allowed the Pursuer to prove the Intromission, in order to the Extinction of the Sum due upon this Apprising; and thereupon an Act was extracted in the Year 1730: But hitherto the Pursuer did not so much as pretend to claim the Warrandice Lands; she insisted only for Redemption of the Wadset Lands, which occasioned the Dispute on which your Lordships pronounced an Act: And therefore, with great Submission, there is not the least Pretence to bring the Defenders to account for the Rents of the Warrandice Lands previous to that Time.

In Consequence of this Act, the Pursuer adduced some Witnesses for proving the Rent of the Warrandice Lands, and the Possession had upon the Apprising; and on 15th January 1731, your Lordships, having advised the State of the Process, with the Testimonies of the Witnesses, "Found it proven, that the Lands of *Easter Williecleugh*, a Part of the Warrandice Lands, are the Sum of 180 *l. Scots* for yearly Rent; "and that the Defender and his Predecessors have been in the Possession of them for the "Space of thirty-nine Years: And also found it proven, that *Ballantyne's* Lands pay "yearly three Bolls Oats, *Kelfo* Measure, to the Master, and that these Lands have "been possessed by the Defender and his Predecessors for thirty-nine Years; and like- "ways find proven, that the Tenement in *Coldstream* pays yearly nine Pound *Scots*."

On the 16th November 1731, there appears in Process the following Minute and Interlocutor: *Hme* craved, "That the Lords might find the Rent intromitted with by "the Defender and his Predecessors in Terms of the last Interlocutor, may be im- "puted towards Extinction of the Sums in the Wadset, in respect, that altho' the De- "fender's Authors were in Right of another Apprising on the whole Lands, yet the "Apprising, in Security whereof the Wadset was granted, being prior, and filed before "the Act of Parliament bringing in Apprisings *pari passu* within Year and Day, the De- "fender's Authors cannot impute their Possession of the Warrandice Lands to the posterior "Apprising. *Hay* answered, That altho' *Kinnier's* Apprising be led before the Act "of Parliament bringing in Apprisings within Year and Day *pari passu*, yet that Act "hath a Retrospect, and it is within that Time, and the Defender his Authors Pos- "session of the Warrandice-Lands can only be imputed to that Title, since he had "no Right to possess them in virtue of the Apprising, in Security whereof the Wadset- "right was granted, till he had been debarred Possession thereof, which did not hap- "pen, and he was in *bona fide* to have purchased the last Apprising, there having been "a Process raised for proving Payment of the first Apprising by Payment, in virtue of "the Wadset-right:" And your Lordships in Presence having advised the above Debate, Find that the Defender and his Authors Possession of the Warrandice-Lands ought to be imputed to *Kinnier's* Apprising.

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The Respondents will acknowledge, that this Minute is erroneous in some Particulars, but the Interlocutor is clear and express, that the Defender was to be allowed to impute his Intromissions to *Kinnier's* Apprising, and consequently it is *res judicata* betwixt the Parties, that these Intromissions are not applicable to the Wadset Sum, whether the principal Wadset Sum, or the Annualrent of the 1000 *l. Scots*; for this Alledgence is expressly proponed for the Pursuer, and repelled; and as a Consequence of this, the Respondents, who are Creditors Adjudgers of the Wadset Right, as well as of *Kinnier's* Apprising, either from *Brownlie* a former Adjudger, or are Adjudgers from *Clapperton*, but have never had any Possession, must be intitled to the full Sums due on the Redemption of the Wadset, altho' a personal Action, to accompt, could ly against *Brownlie*, or any other who intromitted before him; and in that View the present Question can be of no Moment to them.

But even as to the Demand of accompting for Bygones, ly against whom it will, it is submitted to your Lordships whether such Claim, previous to *November 1731*, be not intirely cut off by this Interlocutor, whereby your Lordships found that the Defender and his Authors Possession of the Warrandice Lands ought to be imputed to *Kinnier's* Apprising; which was implicitey finding that the Defender was intitled to retain the same, on account of that Apprising; and indeed the Pursuer, at that Time of Day, had never once pretended to demand Repetition of these bygone Rents, as due to her in the Right of *Hope-Pringle's* Apprising.

The next Point insisted upon for the Pursuer, still going on in her Procefs of Redemption of the Wadset-Lands, was, That the Stipulation of the Annualrent of 1000 *l. Scots* yearly to be paid upon Redemption, was usurious; and that therefore she was not liable to fulfil that Clause in the Contract of Wadset: But in this Point the Pursuer was over-ruled by your Lordships; and justly, so that the Terms and Conditions of the Redemption of the Wadset-Lands, being settled by Interlocutors, the Pursuer had nothing else to do, but to go on with her Conclusion of Extinction of *Kinnier's* Apprising; and for that End, in order to prove the Possession further back, and a higher Rent than was determined by the Interlocutor 1731, recovered some Tacks upon a Diligence, which was executed in the 1736; but about this Time it came to be discovered, that Parties had hitherto proceeded upon a Mistake, in supposing on both Sides, that *George Clapperton* had purchased the Apprising, after he had acquired the Wadset; whereas, upon looking into the Papers, it appeared to be otherways, and that he had first acquired the Apprising, and afterwards bought in the Wadset, which was an Incumbrance affecting his Purchase; and therefore all the former Debate and Judgments that had past upon the contrary Supposition proved useles, and the Pursuer on that Discovery took up her Cause upon the Footing of the Interlocutor 1694, above-recited; and, as by this Time she had recovered Tacks, whereby it appeared that *George Clapperton* had entered to possess in the Year 1665, and likewise instructed the Rent, she endeavoured to make it appear, that a great Part of the Sums in the Apprising were paid before the Year 1679; but as it was demonstrable in Arithmetick that this was not true, she took up a new Alledgence, which was, that the bygone Annualrents, due upon the Redemption of an Apprising, belonged to the Executor of the Apprifer, and not to his Heir, intending by this very conscientiously to lop off ten Years Annualrents of the Sum in the Apprising, which would have made a considerable Alteration in the Accompt: But in this she was also over-ruled by your Lordships Interlocutor, on Report finally adhered to in 1740, upon a Hearing in Presence; and your Lordships were unanimous in this Decision; but hitherto the Pursuer did never put in a Claim to Priority upon *Hope-Pringle's* Apprising, nor indeed had she any just Reason; for, tho' your Lordships can only judge in Facts upon Evidence, and therefore have not found that this Apprising was out of Doors, yet this Pursuer well knew that *Clapperton* had obtained a Decreet of Declarator of Extinction thereof; and therefore, during the Dependence of the old Procefs before the 1694, altho' she at different Times had the Assistance of Sir *George Lockhart*, and other Lawyers of the first Rank, she never pretended to a Preference on this Apprising, neither did she in this Procefs, till she was drawn to it as her last Resource: This she only did for the first Time about five Years ago, and till then, with great Submission, there is no Pretence to insist for Repetition of Bygones, not only because of the Intromitters *bona fides*, but because an Apprifer or Adjudger may lawfully enter to possess the Subject apprised, and will not be obliged to repeat to a prior Apprifer or Adjudger who lyes off, because an Apprifer may take Possession, or he may abstain, or he

he may possess in Part, and leave the rest to be possessed by other Creditors; and if they possess, he cannot call them to an Account, so long as he allows them to continue in Possession. This your Lordships have found, and this the Pursuer admits is Law; but she pretends that she is by no Means in that Case, but is as an absolute Proprietor, tho' the Respondents cannot comprehend upon what Bottom the Pursuer distinguishes herself from any other Apprifer. *Torsonce* a Wadsetter makes Requisition, and apprises the Wadset-Lands, the Apprising expires, and is his only irredeemable Title of Property; but after the Legal is outrun, the apparent Heir of the Debitor his Assigney modestly contents himself with possessing Land worth twice as much as the Sum in the Apprising, but suffers the Remainder of the Estate to be possessed by another Apprifer, whose Legal is also expired; the Respondents can see no Reason why in this Case he can oblige the Apprifer to repeat more, than if the same thing had happened during the Legal; and surely an apparent Heir purchasing an Apprising before the Act 1695, was in no better Place than the Apprifer from whom he purchased.

And as the Pursuer never pretended to exclude the Defenders on *Hope-Pringle's* Apprising till the Year 1741, it cannot be presumed for her that she would have done it, altho' the Apprising had been lying upon the Table; it was against good Conscience for her to do it; and therefore it is not to be presumed she would have done it sooner than it happened.

The Petitioner is pleased to throw out some pretty hard Reflections against the Defender's Authors, for which your Lordships will observe from what is said, there is not the least Foundation: But to say no more upon it, this Plea, of which the Pursuer has now availed herself, is not altogether commendable; she is undoubtedly far more than paid, or has got Lands beyond the Value of what is due her; but the Warrandice-Lands, when *Clapperton* attained Possession thereof on *Kinnier's* Apprising in the 1665, were not in Purchase worth the Sum due on the Apprising; and therefore, as the Lord Ordinary has not thought it proper, so 'tis hoped your Lordships will not think it proper to find the Pursuer intitled to Repetition, upon the Priority of *Hope-Pringle's* Apprising, before she pled that Point; and to presume for her that she would have plead it sooner, had it not been because she doubted of the Honesty of a certain Person now dead, who she says, without any Evidence, was posselt of her Apprising; and upon this Presumption to give her the same Benefit, as if she had made her Plea sooner.

Your Lordships did not find, that *Hope-Pringle's* Apprising was in the Hands of *William Ross of Shandwick*; the Interlocutor is the 17th June 1743, in these Terms: *The Lords find there is sufficient Evidence, that Torsonce's Apprising was delivered to John Clapperton, with the other Papers now produced, and that the same were delivered by him to his Brother George Clapperton; and therefore find that the Defenders in this Process are barred from objecting, that the same is not produced by the Pursuers, and hold the same as produced; repel the Objections founded on the Decreet of Declarator of Extinction of Torsonce's Apprising, at the Instance of George Clapperton against the Representatives of George Ramsay, in anno 1667, in respect there is no sufficient legal Evidence, that such a Decreet ever existed.* But surely there is nothing in this Interlocutor, that can authorize the Pursuer to say, that this Decreet was in the Hands of *Shandwick*; neither is there the least Probability that it was in his Hands, and that he destroyed it; it fell naturally to have been produced in the Process 1666, and to have been lying where that Decreet of Declarator of Extinction 1667 was; and if *Shandwick* had been posselt of the one, he would also have had the other, and it was the Interest of his Clients to produce both; and if it could be presumed against a Man, that he would fraudfully destroy Papers, which it imported him nothing, whether they were destroyed or not, it is probable he would have at the same Time destroyed the Letters of Apprising and the Copy of the Inventory, which has been recovered from among his Papers, and produced in this Process by the Pursuer: And the real Matter of Fact seems to have been, that the Apprising has been produced in the Process of Reduction raised by *Elisabeth Ramsay* in the Year 1680, which never having been concluded, both the Apprising and Decreet of Extinction thereof may have been lost, with some of the Steps of the Process.

From the 1st Part of the above recited Interlocutor it must appear to your Lordships, that the Creditors of *Willicleugh* were *in bona fide* to have posselt upon *Kinnier's* Apprising, till such Time as your Lordships held *Torsonce's* Apprising as produced. And 2^{dly}, and independent of that, and supposing your Lordships had held it as produced, *ab initio*, it appears from the 2^d Part of this Interlocutor, that the Creditors were *in bona fide*, till such Time

Time as your Lordships repelled the Objection founded on the Decreet of Declator of Extinction of *Torrence's* Apprising; and the Allegednce that there was such a Decreet, was not so destitute of Foundation, as that your Lordships did or could think the Allegednce calumnious; tho' it was the Creditors Misfortune that your Lordships were of Opinion, that they did not bring sufficient legal Evidence of it; but none of your Lordships thought but that they did bring very probable Evidence of it.

The only Question then that can remain is, Whether the Creditors were put *in mala fide* by this Interlocutor of the 17th June 1743? And this leads the Respondents to take Notice of the next Step of the Process, which was an Allegednce for the Creditors, that *Hope-Pringle's* Apprising was satisfy'd and paid within the Legal, which they hoped to make appear to your Lordships from several Circumstances. The Decisions, as collected by the Lord *Stair*, and Sir *John Gilmour*, where the Dispute was needles, if the charging *Hope-Pringle* to accompt, during the Years of the prorogated Legal, could not show an Extinction. 2dly, From the Pursuer's Taciturnity, never having claimed nor founded on this Apprising, for upwards of near fifty Year together. 3dly, That it is instructed, that *Hope-Pringle*, and *George Ramsay*, his Assigny, were in Possession in the Year 1656, and *presumitur*, that they were in Possession *retro*; and if this Presumption had held, it was demonstrable in Arithmetick, that the Apprising was extinguished. And 4to, They apprehend, that as the Legal of *Kinnier's* Apprising remained current till the Year 1679, the Legal of *Torrence's* Apprising remained also current till the same Period. In these Particulars, it was the Creditors Misfortune to be over-ruled by your Lordships Judgment, by an Interlocutor pronounced the 5th February 1745; and then the Creditors gave up the Possession of the Warrandice Lands.

The Petitioner is pleased to say, That it was impossible that the Sum in *Hope-Pringle's* Apprising could be paid by Intromission, because the Wadset-Sum was 5000 Merks; and besides this, the Sum in the Apprising was 11,000 Merks more; but the Petitioner is intirely mistaken, the Sum in the Apprising, including the Sheriff-Fees, was only 9586 Merks, 5 s. Scots, and the Apprising was led for the Wadset-Sum and Back-tack Duties, so that there were not two different Claims; and therefore, if the Creditors could have brought satisfying Evidence, that the Appriser had attained Possession in the 1645, this Sum must have been paid, by Intromission, before *Whitsunday* 1664. Or, if your Lordships had been of Opinion that the Legal continued current till the 1679, it must in like Manner have been paid by Intromission with the Rents, from the 1656 till that Period; and beyond all Controversy, this Apprising must have appeared to have been paid, if the Creditors could have recovered the Evidence of *Hope-Pringle's* receiving the Rents of the Wadset Lands of *Kippielaw*, or that Wadset-Sum.

The Petitioner insists, that your Lordships may find that the Defender has got, yearly Payment of the Annualrent of the 1000 l. contained in the Contract of Wadset, out of the Rents of the Warrandice Lands, because, says the Petitioner, the Wadsetter could not lawfully intromet with the Rents of these Lands, upon any other Title than for Payment of this yearly Sum, and that therefore the Presumption of Law must ly, that he intrometted in order to pay himself.

But this is already sufficiently answered; the Interest of the 1000 l. was only due on Requisition, and payable on Redemption, and therefore could be no Title of Intromission. And 2dly, The Wadsetter had no Interest in the Warrandice Lands, but in the Event of Eviction of the principal Lands, which did not happen; and therefore, if the Point were intire, your Lordships would undoubtedly find that *Kinnier's* Apprising was the Title of the Intromission; but this is *hactenus judicata*, and established by your Lordships Interlocutor 1731, above recited; and therefore the Petitioner, sensible of this in a Manner, gives it up, and insists that her Claim to an Accompt for the Bygones, is founded forty Years preceeding the Summons 1726; but this is already sufficiently answered, and the Respondents hope they have made it appear to your Lordships Satisfaction, that the Pursuer has no Claim to Bygones, preceeding the 5th February 1745, the Time fixed by the Lord Ordinary's Interlocutor. And 2do, *et seperatim*, Altho' the Claim did ly, it would only be against Intromettors; but could not compensate or extinguish any Part of the Wadset Right, which the Respondents, who did not intromet, have adjudged.

Upon the whole, it is hoped your Lordships, when the Cafe is considered, will be of Opinion that the Lord Ordinary's Interlocutor, finding "That the Creditors are not accountable for the Rents of the Warrandice Lands, preceeding February 1745," is just; and that the Respondents, who did not intromet, cannot at any Rate be accomptable for these Rents, and that they are intitled to the full Sums which your Lordships have ascertained to be due on the Contract of Wadset.

In respect whereof, &c.

THO. HAY

